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Chairman: Mr. LEHMAN (Denmark)

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The meeting was called to order at 3.30 p.m.

AGENDA ITEM 142: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (continued) (A/50/22)

1. Mr. HALFF (Netherlands) said that his delegation very much welcomed three of the trends that had emerged from the discussions in the Ad Hoc Committee on the Establishment of an International Criminal Court. There was an increasing preference among States for limiting the jurisdiction of the court to a few of the most serious crimes, and the preference of his delegation would be to confine jurisdiction to genocide, serious violations of the laws and customs applicable in armed conflicts, and crimes against humanity. It would prefer not to include the crime of aggression, because of the difficulty of developing a clear-cut definition of such a crime with a view to establishing individual responsibility, because of the primary responsibility of the Security Council in that area and, in general, because of the political character of the issue. The inclusion of other serious crimes could be decided at review conferences.

2. Limiting the jurisdiction of the court to those three very serious crimes and establishing its inherent jurisdiction would have several advantages. The structure of the draft statute, particularly part 3, concerning jurisdiction, could be substantially simplified. For example, the consent of States to the exercise of jurisdiction by the court might be indispensable if the court had jurisdiction with respect to a wide range of crimes, some of which could equally be dealt with on a national basis. Such consent, however, became much less necessary and much less desirable with regard to such crimes as genocide and other crimes against humanity. Those crimes were often committed by organs of the State that could easily frustrate the functioning of the court if their consent to their own prosecution was required.

3. A second trend that had emerged from the deliberations of the Ad Hoc Committee was the growing importance attached to the concept of complementarity, which the draft statute of the International Law Commission merely mentioned in its preamble. It was widely recognized that that notion should be further elaborated in several parts of the statute in order to ensure, on the one hand, that the international criminal court would play a role only in those situations where the exercise of national jurisdiction was apparently unavailable or ineffective and, on the other hand, that the court could function effectively once it was called upon. The issues that deserved further discussion in that respect included those of admissibility, the roles of the prosecutor and the presidency, and cooperation between the court and national jurisdictions. In other words, the final text should guarantee that the crimes in question would be tried in any event, whether by the court or in bona fide national proceedings.

4. The discussions in the Ad Hoc Committee had clearly shown the need for a compromise between the requirements of different legal systems, in particular the systems of common law and civil law. An appropriate way of dealing with that particular question might be to make more specific use of national law as an additional and subsidiary source of law. For example, the court might be

empowered to invoke the national law of the territorial State to deal with questions relating to types of responsibility, defences and other general principles of criminal law.

5. His delegation would favour the elaboration of a consolidated text for submission to a diplomatic conference. Attention could in the first instance be given to the questions of crimes and jurisdiction and then to the question of individual criminal responsibility, questions of procedure and the question of cooperation between the international criminal court and national jurisdictions. A preparatory committee for a conference of plenipotentiaries should be entrusted with the elaboration of the necessary amendments to the draft statute in order to enhance the possibility of reaching consensus.

6. Mr. MADEJ (Poland) said that his delegation reiterated its view that the principle of complementarity constituted one of the most essential elements of the matter at hand. The draft statute, however, made explicit reference to it only in its preamble. The formula used there made it clear that even after the establishment of such a court, national jurisdictions would retain their primacy in all cases, including crimes of international concern. The final text should make very clear to what extent the primacy of the national jurisdiction would be preserved. His delegation also believed that the inherent jurisdiction of the court should not be exclusive but certainly mandatory, so that further consent of States parties to that jurisdiction would not be required.

7. His delegation was convinced that future work should focus on the crimes enumerated in subparagraphs (a) to (d) of article 20 of the draft, namely crimes under general international law. Genocide must be included in the inherent jurisdiction of the court, and the definition of genocide provided by the 1948 Convention, although imperfect, should be retained since it had the virtue of universality.

8. His country saw no reason to object to the inclusion of the crime of aggression within the inherent jurisdiction of the court but shared the view of other States that there were still some difficulties with a satisfactory legal definition of the crime and with a clear differentiation between the acts of States and acts committed by individuals. Serious violations of the laws and customs applicable in armed conflicts should be included in the same category as grave breaches of the Geneva Conventions. Like crimes against humanity, they should be included in the inherent jurisdiction of the court.

9. His delegation supported the proposal made by the delegation of Denmark that a review clause should be included in the statute whereby the list of crimes to be covered by the jurisdiction of the court could be amended. It was of the view, however, that so-called treaty crimes should not be included in the inherent jurisdiction of the court.

10. His country was looking forward to the convening, as soon as possible, of an international conference for the adoption of the statute of an international criminal court. The General Assembly should, at its current session, establish a preparatory committee to elaborate the consolidated text of a convention that would be acceptable to the entire international community and serve as a basic factor for order in international relations.

11. Mr. THANARAJASINGAM (Malaysia) said that, by virtue of the principle of complementarity, the jurisdiction of national criminal justice systems should be given precedence over that of the international criminal court, especially where nationals of the State in question were involved. In connection with the issue of the inherent jurisdiction of the court as envisaged in article 21, paragraph 1 (a), of the draft statute, it remained to be resolved whether that provision was consistent with the principle of national sovereignty enshrined in the Charter of the United Nations, the principle of complementarity and article 22 of the draft statute, which required the consent of States to the jurisdiction of the court.

12. Article 23 of the draft statute sought to confer on the Security Council greater powers that those envisaged in the Charter, was incompatible with the impartiality of the court and was tantamount to giving the permanent members of the Council power of veto over the court's exercise of its jurisdiction. His delegation would therefore like to see it deleted.

13. His delegation could, however, support articles 21 (1) (b) and 22, relating to the consent of States to the exercise of jurisdiction by the court. Further consideration should be given to whether the consent requirement should be extended to additional States having a significant interest in the case, such as the State of nationality of the victim and of the accused and the target State of the crime. The consent of the State of nationality of the accused might be important in cases where its constitution prohibited extradition of its nationals.

14. The crimes over which the court might have jurisdiction were not specified with sufficient accuracy in article 20. All ambiguity must be avoided to enable the accused to prepare his defence. With regard to the crime of genocide, his delegation supported the definition given in the Convention on the Prevention and Punishment of the Crime of Genocide. It was, however, difficult to ascertain the precise legal meaning of aggression, and the concepts of "serious violations" of the laws and customs applicable in armed conflicts and of "crimes against humanity" required clarification. The concept of crimes against humanity should be limited to the most serious abuses of human rights, such as those which had occurred in Bosnia and Herzegovina and Rwanda, and serious consideration must be given regarding its applicability in time of peace. With respect to crimes under treaties, his delegation's view was that States which were not parties to the treaties enumerated in the annex to the draft statute should not be bound by article 20 (e). Further, the authors of such crimes might be more effectively prosecuted and punished under national law.

15. Regarding continuation of the work in hand, the concerns and reservations which had been expressed had not been adequately addressed. His delegation was not opposed to the establishment of a preparatory committee, should the General Assembly so decide, since that would maintain momentum. Without wishing to stipulate a rigid time-frame, his delegation would propose that the preparatory committee should be in a position to submit a report to the General Assembly at its fifty-first session.

16. Mr. MAHON HAYES (Ireland) reiterated his Government's belief in the rule of law as a guiding principle in international relations. The court would be a vital component in the maintenance of international peace and security. While acknowledging the usefulness of the ad hoc tribunals for the former Yugoslavia and Rwanda, he emphasized that only a permanent international court would be able to provide an appropriate response to crimes affecting the international community.

17. The questions raised by the establishment of the court were of two kinds. Firstly, the rights of the defence must be protected and due process must be observed. Secondly, agreement must be reached on the question of complementarity and the list of crimes to be included under its jurisdiction. His Government was of the view that the court should deal only with crimes of exceptional gravity. Its jurisdiction could be extended to major violations, including those committed in time of peace - summary or arbitrary executions, torture and "disappearances". With respect to the principle of complementarity, his Government endorsed the view expressed by the representative of Spain on behalf of the European Union that it was the international criminal court itself that should determine when national jurisdiction should be set aside. As to the crimes that would come before the court, his Government was not happy with the elimination of trafficking in narcotic drugs from the initial list. It would be appropriate to institute a mechanism for ongoing review, as appropriate, allowing additions to the list of crimes. There was no doubt that the court must be mandated to deal with aggression. It was, of course, for the Security Council to determine the existence of aggression and to decide what measures to be taken. It was, however, essential to maintain the independence of the court and to ensure that there was no blurring of its responsibilities with those of the Security Council.

18. Ms. BOREK (United States of America) said that, notwithstanding the significant progress made, much remained to be done to establish an international criminal court acceptable to the international community as a whole. To that end a number of critical issues must be resolved. Her delegation had consistently cautioned against unrealistic propositions that would result in an ineffective court. Those who wished to accelerate the work of the court needed to avoid futile proposals and press for what was achievable.

19. The discussions in the Ad Hoc Committee showed a growing consensus on restricting the jurisdiction of the court to genocide, crimes against humanity and serious war crimes. Her delegation shared the view of many others that crimes under the Convention against Torture and the Convention on the Safety of United Nations and Associated Personnel should be incorporated into the court's jurisdiction. It did not seem that there was enough support to include aggression, drug crimes, terrorism crimes or violations of the International Convention on the Suppression and Punishment of the Crime of Apartheid within the court's jurisdiction. Quite clearly the court would not have the necessary resources to prosecute crimes of terrorism and crimes relating to narcotic drugs, which fell essentially within a national regime.

20. The crime of aggression was fundamentally a crime of States, where the Security Council would have to play a central role. Inclusion of that crime within the competence of the court thus presented the risk of politicization.

It was, moreover, a crime that was still very ill-defined. Even the limited concept of "waging a war of aggression" was far from universally established. Many questions remained unanswered: what possible defences or mitigating factors was it possible to invoke? What was to be done in the case of a disputed territory? Where a conflict was settled by reference to the International Court of Justice, did the losing party automatically become guilty of waging a war of aggression? How should controversial concepts such as humanitarian intervention or a war of liberation be dealt with? Her delegation joined those who supported limiting the competence of the court to the small number of crimes under international humanitarian law on which there was universal agreement.

21. The proposal that the court should have "inherent jurisdiction" over violations of humanitarian law (other than the crime of genocide) was ill-conceived and would not achieve the broad support necessary for a viable court.

22. The question of consent merited further consideration. Nationals of a State could be subject to investigation and prosecution when the State itself was not even party to the court. As many delegations had noted, it was important to elaborate further the principle of complementarity. National jurisdictions should enjoy a presumption of regularity. While no subtle judgement was required when institutions were wholly destroyed or incapable of functioning due to armed conflict, it was much more difficult a judgement to say that a national system was not bona fide.

23. The Security Council had an important role to play in the work of the court, a role which had been criticized as unduly tainting the independence of a judicial body. Ironically, allowing a State to launch cases against another State regardless of whether the resulting international prosecution would be necessary or effective had even greater potential for political misuse. Under the current draft the initiation of cases would be subject to the political agenda of a particular State rather than a collective decision by the Security Council that would, in fact, be less likely to reflect a political bias than that of an individual State. In any event the small number of crimes detailed was in almost all cases relevant to matters of which the Security Council was likely to be seized under its mandate to maintain and restore international peace and security.

24. The primary purpose in establishing a permanent international criminal court was to avoid the necessity of the Security Council establishing ad hoc tribunals to deal with crimes under international humanitarian law. The statute should recognize the authority of the Security Council to refer situations to the court in such a way as to ensure that all States must cooperate with it. It would, however, be for the prosecutor and the court - not the Security Council - to decide which specific cases should be initiated and against whom. The court must be an independent judicial institution, without interference from political bodies. The role of the Security Council could thus be defined so that it in no way undermined the judicial independence of the court, its judges and its prosecutor, but, rather, strengthened the court in addressing the important cases that would be part of its mandate.

25. Many other issues needed to be resolved, including the structure, organization and financing of the court, its primacy in relation to bona fide State jurisdiction, and the rules of evidence or procedure under which it would function. It was important to continue work without setting unrealistic deadlines and to garner the widespread support needed for an effective and global court. In particular it would be premature to set a date for a diplomatic conference without having resolved the many outstanding issues.

26. Mr. VILLAGRAN KRAMER (Guatemala) said that in order to reach agreement on the substantive questions regarding the draft statute of an international criminal court, an attempt should be made to find a common denominator among not only European legal systems (common law and roman law) but also the principles of the Islamic system and the profound philosophical thinking of the Far East. Account should also be taken of the interests of small countries to enable them to participate in the work of the court.

27. The principle of complementarity should be considered in that context. His delegation disagreed with the view that the court should function only if the justice system in the country in question collapsed or if its legal procedures were ineffective. In that regard, it was necessary to rely on unambiguous legal criteria and not on political criteria, as demonstrated by Latin America's disastrous experience with recourse to the concepts of "denial of justice" and "defiance of justice". The modern parameters to be adopted were those of independent and impartial courts, which, moreover, were well established in the European and inter-American human rights conventions, the African Charter of Human Rights and the Rights of Peoples and the International Covenant on Civil and Political Rights. Agreement must be reached on the principle of complementarity in all areas where it played an important role.

28. Acceptance of the jurisdiction of the court would promote the development of international law. The application of the general rules of international law was closely linked to the question of treaty-based crimes. If one acknowledged that certain international crimes were defined and recognized as such under general international law, genocide was not the only crime that fell into that category and the list of such crimes should be expanded. Flexibility was required in that regard and consideration should be given to the possibility of periodically revising the list of treaty-based crimes.

29. The nature of the court's jurisdiction was closely linked to applicable law. Treaties must be applied since they defined specific crimes. Nevertheless, consideration should also be given to the application of general treaty law, as laid down, for example, by the Vienna Convention on the Law of Treaties. If the court had its own jurisdiction, it would have to apply provisions of international general law. International customary law would also have a place in the court's work. National legislation should perhaps be seen from the perspective of general principles of criminal law common to all legal systems.

30. His delegation viewed favourably the list of crimes under international general law drawn up by some delegations on the basis of article 20 of the draft statute. Nevertheless, it felt that certain crimes should be added to the list, for example, apartheid terrorist acts and international illicit drug

trafficking. It was above all small countries which suffered as a result of those crimes, and the court could be seen as a mechanism for settling international disputes between large and small countries in that area. His delegation also favoured the inclusion of the crime of aggression on the list.

31. The procedure for bringing accused persons before the court should not be considered equivalent to extradition, as ILC maintained. It was not a question of extradition, which was a bilateral process, but rather of an international obligation on the part of all States to surrender the accused to the court. The distinction between extradition and surrender of the accused must be clearly established.

32. The Security Council unquestionably had a role to play under the Charter in referring certain international crimes to the court, for example, when applying Chapter VII. It was also necessary to recognize the role of the Council in determining acts of aggression and bringing the persons who perpetrated those acts and certain other crimes before the court. Nevertheless, the problem lay not so much in the role of the Security Council, but rather in the exercise of the right of veto by one or more of its permanent members. The court could then be prevented from carrying out its functions and that was a matter of real concern for small countries.

33. Mr. KEITA (Mali) said that the international criminal court would be an essential instrument for combating national and transnational crime, international terrorism, crimes against humanity and other grave violations of human rights.

34. Mali, which was convinced of the need to strengthen international cooperation in the legal field, participated actively in the efforts carried out for that purpose in its subregion. It was a party to the multilateral conventions on mutual legal assistance and extradition concluded within the framework of the Economic Community of West African States with the support of the Crime Prevention and Penal Justice Service of the United Nations Office at Vienna.

35. The court should be a permanent institution because ad hoc courts could not play any deterrent or preventive role. The fundamental principle of complementarity should be clearly defined in the body of the text of the draft convention on the establishment of the court. When a case was submitted to the court, domestic law should be subordinated to international law.

36. The court's jurisdiction could be limited to serious violations such as genocide, crimes against humanity, international terrorism and grave violations of human rights during armed conflict. In addition, the court should judge only individuals.

37. While his delegation recognized that aggression constituted a serious crime against peace and security, it had reservations concerning its inclusion within the jurisdiction of the court, on the one hand, because there was no definition of aggression on which there was an international consensus and, on the other hand, because of the specific difficulties that arose in bringing proceedings

against a State and its leaders. Furthermore, cases of aggression should be dealt with only by the Security Council and disputes between States should be considered by the International Court of Justice.

38. His delegation supported the idea of making the Ad Hoc Committee a preparatory committee with the task of drawing up a draft convention. Mali also favoured the convening of an international conference in order to make progress on the draft statute.

39. Mrs. WONG (New Zealand) said that, at the forty-ninth session, there had been a spirited debate in the Committee about whether it should refer the ILC text to a diplomatic conference. Since some delegations had felt that it was too early to convene a conference of plenipotentiaries, the Sixth Committee had finally opted for a compromise by establishing the Ad Hoc Committee. Since the Ad Hoc Committee had completed its work, it was time to proceed to the next stage, namely the establishment of a preparatory committee, which should make it possible for the conference to begin its work in 1997. Her delegation felt that that should be clearly indicated in a resolution to be adopted at the current session.

40. At the current stage, there was no longer any question as to whether there would be a court. In view of the atrocities committed in Rwanda and the former Yugoslavia, no State could reasonably argue that there should be no international court before which the perpetrators of those crimes would be called to account.

41. Steps must be taken to ensure that the court was not a puppet on a string, activated only at the will of the strong against the marginal. The court should be accessible for all States, small and weak or large and powerful. It should thus have the responsibility of applying the principle of complementarity and deciding whether national jurisdictions were available and effective.

42. If the court was limited to the most serious crimes, the presumption must then be that the court would have a superior claim to exercise jurisdiction. The very nature of the crimes that fell within its competence called for the international community to exercise collective responsibility. It must not be the court's burden to demonstrate that it had jurisdiction by having to prove that there was no effective national jurisdiction available; that burden would render the court useless.

43. The court's ability to initiate an independent prosecution was of paramount importance, regardless of whether or not a national investigation was taking place. The prosecutor should be able to investigate and prosecute cases on his or her own initiative. Similarly, it would be completely inadmissible if the Security Council was able to prevent the court from exercising its jurisdiction by simply claiming that it had already been "seized" of the matter. The court must be truly independent and, in that regard, her delegation had doubts about article 23, paragraph 3, of the Commission's draft text.

44. Her delegation strongly supported the proposal that the court should have "inherent jurisdiction" over all "hard core" international crimes. The court

should also have jurisdiction over certain treaty-based crimes, including torture, the offences established by the Convention on the Safety of United Nations and Associated Personnel and, where the parties involved agreed, particular incidents of terrorism. All those crimes called for a collective response on the part of the international community. The crime of aggression should also be under the court's jurisdiction; however, the Security Council should also be given a role in that area.

45. The mechanism by which cases were brought before the court should be broader and more independent of States. It would be a mistake to increase the number of States whose consent was required before prosecution could begin.

46. The recommendation contained in paragraph 257 of the report of the Ad Hoc Committee should be fully reflected in the resolution that would be adopted. The mandate authorizing preparatory work should not lead away from the general direction defined in the carefully balanced framework that the Commission had established.

47. Mr. KRUGER (South Africa) said that his delegation favoured the establishment of the court by way of a multilateral treaty rather than by an amendment to the Charter. The latter approach would inevitably result in it being coupled with other proposed amendments to the Charter and thus lead to a delay in the establishment of the court. In addition, a pragmatic approach should be followed by starting the court more modestly while giving it the potential to expand its jurisdiction and activities once it had proven its efficacy, established its reputation and been accepted by the international community.

48. For that reason, only a few international crimes should initially be included under the court's jurisdiction, namely, the crime of genocide, serious violations of the laws and customs of war (to which perhaps could be added grave breaches of the 1949 Geneva Conventions) and crimes against humanity. The crime of aggression had not been sufficiently developed to allow for the prosecution of individuals before an international criminal court. Aggression constituted an act of State, and its application to individuals was not possible at the current stage. Similarly, treaty-based crimes should not be included under the jurisdiction of the court at the current stage. Any attempt to do so would delay its creation. At the same time, his delegation was not opposed to the concept of granting the court jurisdiction over those crimes. The court's statute should provide for a mechanism for the future expansion of its jurisdiction. In that regard, the draft Code of Crimes against the Peace and Security of Mankind could be considered for inclusion under the court's jurisdiction at an appropriate time.

49. His delegation was not averse to allowing the Security Council to refer certain situations to the international criminal court. That would shield the court from having to make judgements on matters that were essentially political in nature and fell properly within the domain of the Council. However, such a referral must not be prescriptive in nature, since the court must remain an independent judicial body. This provision would obviate the need for the Council to establish further ad hoc tribunals.

50. With regard to the appointment of judges and the prosecutor, his delegation considered that the principle of equitable geographical representation should be taken into account. It seemed premature to consider budgetary matters when the very nature of the court had not been totally clarified.

51. His delegation strongly supported the idea that the General Assembly should extend a mandate to a preparatory committee to build on the work completed thus far by drafting a text to be adopted at a diplomatic conference in the near future. The future work of that committee should be based on the draft statute of ILC, the reports of the Ad Hoc Committee and comments made by Member States and relevant organizations. It would be most beneficial for the preparatory committee to hold three 2-week sessions in 1996. If no time-limit was set for convening a diplomatic conference, it would be possible to procrastinate forever under the pretext of doing very thorough work. His delegation therefore proposed that the conference should be convened in 1997.

52. Mr. MWANGI (Kenya) said that the ultimate goal must to be to establish a court that commanded the respect of, and was adhered to by, all States. It was clear from the Ad Hoc Committee's report that the Commission's draft still contained a number of unresolved questions. Consensus on those areas must emerge before a conference of plenipotentiaries could be convened. It would therefore be premature to convene such a conference since setting too tight a time-frame could compromise the pragmatic approach that had prevailed so far.

53. The cardinal principle that formed the basis for the establishment of an international criminal court was the principle of complementarity, which underscored the primacy of national jurisdiction. That primary responsibility of national courts must be safeguarded in the statute of the future court and any provision that could undermine that principle should be reviewed. The principle of complementarity should therefore be stated in the body of the text and not only in the preamble.

54. The problem of the court's jurisdiction over the crimes covered under the draft Code of Crimes against the Peace and Security of Mankind (which was awaiting completion by the Commission) should also be considered. It would be difficult to confer jurisdiction on the court over crimes whose precise definition had not yet been agreed upon. Similarly, crimes listed in the draft statute had not yet been clearly defined.

55. Many developing countries had been unable to send their experts to the meetings of the Ad Hoc Committee, as a result of which the quality and balance of the debates had been impaired. In its report, the Ad Hoc Committee encouraged as many States as possible to participate in its future work. It was therefore necessary to find the means to enable representatives of developing countries to participate fully and effectively in future work on the establishment of the court.

56. Mr. BAENA SOARES (Brazil) recalled that his country had always favoured the establishment of an international criminal court, which could only strengtnen justice and the international criminal system and would avoid the proliferation of ad hoc tribunals, as had been the case in recent years.

57. His delegation felt that the international criminal court should be established as an independent judicial organ by means of a multilateral treaty and that there should be a close relationship between the court and the United Nations in order to ensure the universality and moral authority of the court, as well as its financial and administrative viability.

58. The jurisdiction of the court should be limited to the most serious crimes of concern to the international community. In light of the principle of nullum crimen sine lege, nulla poena sine lege, it was important that the jurisdiction of the court should apply only to those crimes which were clearly and precisely defined in the statute. With regard to the definition of the crimes that would fall under the court's jurisdiction, the Ad Hoc Committee should carefully consider the discussions which had taken place in the Commission on the draft Code of Crimes against the Peace and Security of Mankind in order to avoid any risk of duplication.

59. There were still several important questions which deserved further consideration by the Ad Hoc Committee, such as the principle of complementarity, according to which the court was intended to be complementary to national criminal justice systems in cases where the necessary trial procedures might be unavailable or ineffective.

60. With regard to the principle of State consent to the court's jurisdiction, his delegation felt that acceptance of the court's jurisdiction by a State should be voluntary, which led to the question of international cooperation and judicial assistance on the part of States, as provided for in article 51 of the draft statute (see document A/49/10). His delegation felt that the general obligation of States parties to the statute to cooperate did not provide those States with sufficient latitude.

61. His delegation wished to express its appreciation to the Government of Italy, which had offered to host the international conference of plenipotentiaries. Before reaching that stage, much work remained to be done in order to reach a consensus on the principle of complementarity, the principle of nullum crimen sine lege, the jurisdiction of the court and State consent. His delegation believed that at the Ad Hoc Committee's 1996 sessions those differences of opinion would be overcome and all delegations would be able to agree on the convening of a conference of plenipotentiaries in 1997.

62. Mr. ZIMMERMANN (International Committee of the Red Cross (ICRC)) said that ICRC was interested in the repression of war crimes because it was a matter directly related to the implementation of international humanitarian law. That law laid down the obligation to punish the grave breaches that it defined; if the mechanism formally established by it were actually put into effect, it would ensure that breaches were dealt with impartially and in all circumstances. The creation of ad hoc tribunals was a response to that mechanism's ineffectiveness in practice. There was no doubt that those tribunals had made an important contribution to the implementation of humanitarian law in the former Yugoslavia and in Rwanda. However, they were merely one stage in a process that must culminate in the establishment of a permanent court whose jurisdiction would cover all war crimes.

63. With regard to article 20 of the draft statute for the court, entitled "Crimes within the jurisdiction of the Court" (A/49/10), he noted with satisfaction that subparagraph (e) referred, by way of the annex to the draft statute, to grave breaches of the four Geneva Conventions of 1949 and of Protocol I Additional thereto of 1977. That reference was important in that the Conventions were universally recognized. Although Protocol I had not yet achieved the same universal acceptance, attention must be firmly drawn to the essential provisions that it contained.

64. While the value of the instruments mentioned in the annex to the draft statute, to which article 20 (e) referred, was beyond question, it was nevertheless correct to consider that the statute would not impose any obligations upon States on the basis of treaties to which they were not party. Reference to those treaties would, however, enable the court to decide on its own jurisdiction in cases involving "exceptionally serious crimes of international concern", although that concept still required clarification.

65. Moreover, since the provisions of the Geneva Conventions and Additional Protocol I on the repression of war crimes were applicable only to international armed conflicts, the future statute should include in the court's jurisdiction serious violations of the law of non-international armed conflict. It should be noted that the reference in article 20 (c) to "serious violations of the laws and customs applicable in armed conflict" assigned to the court a jurisdiction which went beyond the concept of grave breaches. That provision could, in particular, cover crimes committed in non-international armed conflicts. The trial chamber and appeals chamber of the International Criminal Tribunal for the Former Yugoslavia had adopted that approach in their decisions on jurisdiction.

66. ICRC had also closely studied the draft Code of Crimes against the Peace and Security of Mankind. It was pleased to note that in the new draft text of article 22, the Special Rapporteur had chosen to return to the widely accepted term "war crimes" in both the title and the text of the draft article, thus abandoning the wording "exceptionally serious war crimes".

67. The new draft article, which opted for a restrictive approach in its first paragraph, referred to the violations defined as "grave breaches" by the Geneva Conventions of 1949. To those should be added "unlawful confinement", a grave breach under the Fourth Geneva Convention (art. 147). In that connection, in the French text of subparagraph (f) of the draft article in question, the words "une personne" should be replaced by the words "un prisonnier", to correspond to the English version. In addition, the concept of grave breaches in international humanitarian law covered not only the acts defined as such in the Geneva Conventions of 1949, but also those specified in article 85 of Additional Protocol I of 1977. It would therefore be appropriate to add the list of grave breaches listed in that article to draft article 22 in order to ensure that the list was comprehensive with regard to international humanitarian law.

68. In any case, it would be difficult to imagine that war crimes such as "making the civilian population or individual civilians the object of attack" (art. 85, para. 3 (a), of Protocol I) would not appear in the list of crimes

covered by the Code. Their inclusion would be in line with the approach taken in the statute for an international criminal court.

69. Lastly, the new draft article referred in its second paragraph to "the laws or customs of war", giving examples of breaches of the law governing the conduct of hostilities while specifying that those examples were not exhaustive. Despite the commendably broad interpretation of that concept by the International Criminal Tribunal for the Former Yugoslavia, ICRC would prefer a more explicit reference to the treaty-based and customary rules which also governed non-international armed conflicts.

The meeting rose at 5.35 p.m.